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State v. Herod Appellant's Reply Brief Dckt. 43108

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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)	
)	
Plaintiff-Respondent,)	NO. 43108
)	
v.)	CANYON COUNTY
)	NO. CR 2013-25890
DAVID GEORGE HEROD,)	
)	REPLY BRIEF
Defendant-Appellant.)	

REPLY BRIEF OF APPELLANT

**APPEAL FROM THE DISTRICT COURT OF THE THIRD JUDICIAL
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE
COUNTY OF CANYON**

**HONORABLE JUNEAL C KERRICK
District Judge**

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TABLE OF CONTENTS

	<u>PAGE</u>
TABLE OF AUTHORITIES	ii
STATEMENT OF THE CASE	1
Nature of the Case	1
Statement of the Facts and Course of Proceedings	1
ISSUE PRESENTED ON APPEAL	2
ARGUMENT	3
The District Court Abused Its Discretion When It Allowed Ms. Ortega To Testify On How She Determined Whether An Allegation Is False, Because Her Testimony Passed Upon The Credibility Of The Complaining Witnesses And Thereby Usurped The Jury's Function	3
A. Introduction	3
B. Ms. Ortega's Testimony Passed Upon The Credibility Of The Complaining Witnesses And Thereby Usurped The Jury's Function	3
C. The State Has Not Met Its Burden Of Proving The District Court's Abuse Of Discretion Was Harmless	8
CONCLUSION	9
CERTIFICATE OF MAILING	10

TABLE OF AUTHORITIES

Cases

<i>State v. Almaraz</i> , 154 Idaho 584 (2013).....	4, 6
<i>State v. Blackstead</i> , 126 Idaho 14 (Ct. App. 1994)	6, 7, 8
<i>State v. Critchfield</i> , 153 Idaho 680 (Ct. App. 2012)	4, 5, 6
<i>State v. Perry</i> , 139 Idaho 520 (2003)	3, 6
<i>State v. Perry</i> , 150 Idaho 209 (2010)	8

Rules

I.R.E. 702	3, 6
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STATEMENT OF THE CASE

Nature of the Case

Following a jury trial, the jury found David George Herod guilty of two counts of felony lewd conduct with a minor under sixteen. On each count, the district court imposed a concurrent unified sentence of twenty-five years, with seven years fixed. Mr. Herod appealed, asserting the district court abused its discretion when it allowed one of the State's expert witnesses, Alisa Ortega, to testify on how she determined whether an allegation is false, because her testimony passed upon the credibility of the complaining witnesses and thereby usurped the jury's function.

In its Respondent's Brief, the State argued that Mr. Herod did not establish an abuse of discretion because Ms. Ortega's challenged testimony was admissible evidence relevant to credibility and not an inadmissible opinion that a witness was telling the truth, and that any error was harmless. (Resp. Br., pp.5-12.) This Reply Brief is necessary to show the State's argument ignores the distinction between expert testimony that merely assists the jury and testimony like Ms. Ortega's, that passes upon the credibility of witnesses and thereby usurps the jury's function.

Statement of Facts and Course of Proceedings

The statement of facts and course of proceedings were previously articulated in Mr. Herod's Appellant's Brief. They need not be repeated in this Reply Brief, but are incorporated herein by reference thereto.

ISSUE

Did the district court abuse its discretion when it allowed Ms. Ortega to testify on how she determined whether an allegation is false, because her testimony passed upon the credibility of the complaining witnesses and thereby usurped the jury's function?

ARGUMENT

The District Court Abused Its Discretion When It Allowed Ms. Ortega To Testify On How She Determined Whether An Allegation Is False, Because Her Testimony Passed Upon The Credibility Of The Complaining Witnesses And Thereby Usurped The Jury's Function

A. Introduction

Mr. Herod asserts the district court abused its discretion when it allowed Ms. Ortega to testify on how she determined whether an allegation is false, because Ms. Ortega's testimony passed upon the credibility of witnesses and thereby usurped the jury's function. *See State v. Perry*, 139 Idaho 520, 525 (2003).

B. Ms. Ortega's Testimony Passed Upon The Credibility Of The Complaining Witnesses And Thereby Usurped The Jury's Function

Mr. Herod asserts that Ms. Ortega's testimony on how she determined whether an allegation was false passed upon the credibility of the complaining witnesses and thereby usurped the jury's function. Ms. Ortega's testimony indirectly vouched for the truth of T.W.'s and A.M.'s accounts. Her testimony was "useful to bolster [the witnesses'] credibility but [did] not provide the trier of fact with any additional information" that pertained to the case. *See Perry*, 139 Idaho at 525. Because credibility questions are left to the jury, the testimony did not "help the trier of fact to find facts or understand the evidence as required by I.R.E. 702." *See id.* Put otherwise, with her testimony, Ms. Ortega "usurp[ed] the role of the jury as the ultimate finder of credibility." *See id.*

The State recognizes that expert testimony is admissible up to the point where an expression of opinion would require the expert to pass upon the credibility of witnesses. (Resp. Br., p.6.) The State argues that "while a witness may not opine on

the truthfulness of another witness' statement, an expert may impart knowledge that will assist the jury to make its own evaluation.” (Resp. Br., p.7 (citing *State v. Almaraz*, 154 Idaho 584, 599-600 (2013); *State v. Critchfield*, 153 Idaho 680, 684-85 (Ct. App. 2012).) The State then contends that Ms. Ortega’s testimony was admissible because she “did not ‘venture beyond [the] point’ of ‘pass[ing] upon the credibility of witnesses or the weight of disputed evidence,’” but instead “merely provided many factors she employed when deciding whether to diagnose sexual abuse.” (See Resp. Br., p.7.)

The State’s argument ignores the distinction between expert testimony that merely assists the jury and testimony, like Ms. Ortega’s, that passes upon the credibility of witnesses and thereby usurps the jury’s function. The *Almaraz* and *Critchfield* cases cited by the State (see Resp. Br., p.7), help illustrate the failings of the State’s argument. While the State characterizes the holdings in *Almaraz* and *Critchfield* as “expert opinion helping jury determine reliability of eyewitness identification admissible” (Resp. Br., p.7), the State’s gloss on those cases does not tell the full story.

In *Almaraz*, the district court prohibited defense expert testimony on the suggestiveness of an officer’s interview procedures used to obtain an eyewitness identification in a first-degree murder case. *Almaraz*, 154 Idaho at 588-89. The district court allowed the defense expert, a cognitive psychologist, to testify about the suggestiveness of the photographic lineup used by the officer, but ruled his expert opinion on the suggestiveness of the interview would invade the province of the jury. *Id.* at 599. On appeal, the Idaho Supreme Court held “the district court abused its discretion when it ruled that [the defense expert] could not testify about the specific procedures used in [the eyewitness’] interview.” *Id.* at 600. The *Almaraz* Court noted

“[t]he disallowed testimony offered by [the defense expert] was aimed at specific procedures employed by [the officer], and how empirical research has shown those procedures to be suggestive. [The defense expert] was not offering an opinion on the credibility or accuracy of the eyewitness testimony itself.” *Id.*

In *Critchfield*, the district court granted the defendant’s motion for a new trial in a lewd conduct case on the basis that the district court should have allowed a defense expert in law enforcement interview techniques to testify on proper interview techniques, the purposes behind those techniques, and how improper techniques were used in the victim interviews at issue. *Critchfield*, 153 Idaho at 682. The State appealed from the district court’s order for a new trial, contending the defense expert’s testimony was properly excluded at the initial trial. *Id.* The State argued the defense expert’s testimony would be inadmissible as usurping the jury’s function or invading the province of the jurors, but the Idaho Court of Appeals rejected that argument. *Id.* at 684-85. The *Critchfield* Court held “the offer of proof regarding [the defense expert’s] proposed testimony did not include any such prohibited opinion on the credibility of any victim witness or on [the defendant’s] guilt.” *Id.* at 684. The proffered testimony was admissible because the defense expert “would critique the officers’ interview methods, not the alleged victims’ accuracy or honesty.” *Id.*

The full story behind the *Alvarez* and *Critchfield* holdings helps show the State’s argument ignores the distinction between expert testimony that merely assists the jury and testimony that passes upon the credibility of witnesses and thereby usurps the jury’s function. The expert testimony in *Alvarez* would have concerned “specific instances of police suggestiveness, which would have been helpful to the average

juror's understanding of whether the interview was conducted in an overly suggestive way." *Alvarez*, 154 Idaho at 600. To the contrary, Ms. Ortega testified here regarding what details would lead her to conclude an allegation of child sexual abuse was probably true (Trial Tr., p.153, Ls.11-24), and the complaining witnesses provided those types of details at the trial. (See App. Br., p.11.) Thus, unlike the defense expert in *Alvarez*, who did not offer an opinion on the credibility or accuracy of the eyewitness testimony itself, Ms. Ortega's testimony indirectly vouched for the truth of T.W.'s and A.M.'s accounts. *Cf. Alvarez*, 154 Idaho at 600. The *Alvarez* Court emphasized "[c]redibility is an issue for the jury, as the jury is the lie detector in the courtroom." *Id.*

Similar to *Alvarez*, the offer of proof regarding the defense expert's proposed testimony in *Critchfield* did not include any prohibited opinion on the credibility of any victim witness. See *Critchfield*, 153 Idaho at 684. In contrast, Ms. Ortega's testimony spoke to the alleged victims' accuracy or honesty. *Cf. id.* As discussed in the Appellant's Brief (see App. Br., pp.11-13), such credibility determinations are not beyond the common experience of the jury, and the jury's function is to make credibility determinations. Thus, unlike the testimony in *Alvarez* and *Critchfield*, Ms. Ortega's testimony did not "help the trier of fact to find facts or understand the evidence as required by I.R.E. 702." See *Perry*, 139 Idaho at 525.

The State further argues that Mr. Herod's assertion on appeal "was effectively rejected by the Idaho Court of Appeals in *State v. Blackstead*, [126 Idaho 14, 21-22] (Ct. App. 1994)." (Resp. Br., p.8.) However, the State has failed to mention the factual differences between the testimony at issue in *Blackstead* and Ms. Ortega's testimony. Because of those factual differences, *Blackstead* is not controlling here.

In *Blackstead*, the State called as an expert witness a licensed counselor, who specialized in the treatment of victims of childhood sexual abuse. *Blackstead*, 126 Idaho at 20. The State's expert testified about behavioral characteristics of sexual abuse victims, including delay in disclosing the abuse. *Id.* Before the State's expert testified, an alleged victim had already testified as to why she delayed in reporting the defendant's alleged sexual abuse. *Id.* at 20-21. On appeal, the Idaho Court of Appeals rejected the defendant's "argument that [the State's expert's] testimony amounted to nothing more than vouching for the victim's credibility and was cumulative to the victim's own testimony," because it "overlooks the distinction that merely opines as to the victim's credibility and testimony which corroborates elements of the victim's story or aids the jury in evaluating the victim's truthfulness." *Id.* at 22.

The State's treatment of *Blackstead* stops there (see Resp. Br., p.8), but again the State has not told the full story. The State's expert in *Blackstead* "had never interviewed [the alleged victim] or reviewed her records, and she offered no testimony directly addressing [the alleged victim's] own experiences. Neither did she present an opinion as to whether [the alleged victim's] testimony was truthful, whether [the alleged victim] had been abused or by whom." *Blackstead*, 126 Idaho at 22. Conversely, in the instant case Ms. Ortega conducted a physical examination of A.M. (Trial Tr., p.169, Ls.19-25,) and watched A.M.'s forensic interview. (Trial Tr., p.158, Ls.15-17.) During the physical examination, Ms. Ortega asked A.M. whether there had been any pain, hurt, or bleeding. (Trial Tr., p.170, Ls.8-12.) Ms. Ortega also offered testimony on A.M.'s experiences as A.M. related them during the forensic interview. (Trial Tr., p.158,

L.22 – p.165, L.2, p.167, L.13 – p.168, L.21.) Further, Ms. Ortega presented an opinion as to whether A.M. had been sexually abused. (Trial Tr., p.170, L.22 – p.171, L.2.)

Thus, there are key factual differences between the testimony at issue in *Blackstead* and Ms. Ortega's testimony. The *Blackstead* Court held the State's expert's testimony was properly admitted because the expert "gave the juror's specialized knowledge that could help them evaluate the credibility of [the alleged victim's] explanation as to why she failed to more promptly disclose the alleged abuse. The expert did not, however, comment on [the alleged victim's] veracity" *Blackstead*, 126 Idaho at 22. In this case, rather than assist the jury with specialized knowledge, Ms. Ortega's testimony went towards the veracity of the complaining witnesses. *Cf. id.* Because of the factual differences discussed above, *Blackstead* is not controlling here.

Ms. Ortega's testimony on how she determined whether an allegation was false passed upon the credibility of the complaining witnesses and thereby usurped the jury's function. The State's argument to the contrary ignores the distinction between expert testimony that merely assists the jury and testimony like Ms. Ortega's, that passes upon the credibility of witnesses and thereby usurps the jury's function. The district court abused its discretion when it allowed Ms. Ortega to testify on how she determined whether an allegation is false.

C. The State Has Not Met Its Burden Of Proving The District Court's Abuse Of Discretion Was Harmless

Mr. Herod asserts the State has not met its burden of proving the district court's abuse of discretion in allowing Ms. Ortega's challenged testimony was harmless beyond a reasonable doubt. *See State v. Perry*, 150 Idaho 209, 227 (2010). To the extent the

State's harmless argument relies upon its incomplete characterization of *Blackstead* (see Resp. Br., pp.10-11), its argument should be rejected because *Blackstead* is not controlling here.

The State's harmless argument is otherwise unremarkable, and Mr. Herod would thus direct this Court's attention to Pages 14-15 of the Appellant's Brief.

CONCLUSION

For the above reasons, as well as the reasons contained in the Appellant's Brief, Mr. Herod respectfully requests this Court reverse the judgment of the district court and remand the case for a new trial.

DATED this 26th day of April, 2016.

_____/s/
BEN P. MCGREEVY
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 26th day of April, 2016, I served a true and correct copy of the foregoing APPELLANT'S REPLY BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

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